

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 10, 2009

STATE OF TENNESSEE v. NELSON VEGA PLANA

Appeal from the Circuit Court for Montgomery County
No. 40100094 John H. Gasaway, III, Judge

No. M2008-00717-CCA-R3-CD - Filed June 22, 2009

After a jury trial, in the Montgomery County Circuit Court, Appellant, Nelson Vega Plana, was convicted of two counts of first degree murder and one count of felony murder. The trial court merged the felony murder conviction with one of the first degree murder convictions. Appellant was sentenced to serve two consecutive life sentences. The trial court denied a motion for new trial. Appellant seeks a review of the following issues on appeal: (1) whether the evidence is sufficient to sustain the convictions where there was, according to Appellant, no proof of premeditation; (2) whether the trial court erred by allowing the jury to consider the testimony of a police detective that violated Appellant's Sixth Amendment right to counsel; and (3) whether the sentences should run concurrently pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004) and related cases. Initially, we determine that Appellant filed an untimely notice of appeal. However, we waive the untimeliness of the notice in the interest of justice. As to the remaining issues, we determine that the evidence was sufficient to support the convictions; the trial court did not err in admitting the testimony of Detective Green; and *Blakely* does not apply to consecutive sentencing. Accordingly, Appellant is not entitled to relief, and the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Nelson Vega Plana.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; and John Carney, District Attorney General; and Helen Young, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Shortly after midnight on January 1, 2001, Ivelys Miranda and her son Adan¹ Rodriguez were found shot inside apartment 103 D on Northway Drive in Clarksville, Tennessee. Officer Sheryl Jett of the Clarksville Police Department responded to the call at the apartment that was occupied by Appellant and Radames “Ray” Melendez. When Officer Jett arrived at the apartment, a hispanic man opened the door. Appellant was not home. Inside the apartment, Officer Jett observed a woman and a young boy around five or six years of age that had been shot. The female victim was sitting on the loveseat and had been shot in the head and the shoulder. The boy was lying on the floor and had a bullet hole above his left eye. Both of the victims were “barely” alive.

Officer Jett secured the scene and allowed medical personnel to transport the victims to the hospital. Both of the victims eventually died from their injuries.

There were several people in the apartment at the time of Officer Jett’s arrival. She did not interview the four people in the apartment at that time because there was an “obvious” language barrier. Instead, Officer Jett requested a Spanish-speaking officer on the scene.

As a result of the investigation, officers learned that earlier that evening, there was a party in Perla Rodriguez’s apartment, apartment A, to celebrate New Year’s Eve. At the time, Ms. Miranda and Daniel were staying with Ms. Rodriguez even though Ms. Miranda was renting apartment 100 E at the same complex. Ms. Miranda had just ended a romantic relationship with Appellant.² In fact, Appellant was invited to the party but did not attend because he was mad. The guests started arriving at the party around 10:00 p.m.

Earlier that evening, around 7:30 or 8:00 p.m., Ms. Miranda took some food to Appellant’s apartment. She was only gone for a short time. Later that evening, around 11:40 p.m., Ms. Rodriguez saw Ms. Miranda talking to someone on the phone. When she hung up the phone, Ms. Miranda took her son with her to Appellant’s apartment to talk to him. Ms. Miranda told Ms. Rodriguez that she was taking Daniel with her “so that nothing would happen.” Ms. Miranda planned to return to the party prior to midnight.

Mr. Melendez claims that he saw Ms. Miranda and Daniel leave around 11:00 p.m. At around 11:40 p.m., Mr. Melendez went to his apartment to get some beer. When he arrived, the door was locked. He unlocked the door and saw Ms. Miranda sitting on the small sofa and her son playing on the floor. Appellant was sitting on the big sofa. No one spoke to Mr. Melendez as he walked to the refrigerator to get the beer.

¹ It appears that Adan went by the name “Daniel.” This Court will refer to him as Daniel because most of the witnesses at trial referred to him as Daniel.

² According to Ms. Rodriguez, about one week prior to New Year’s Eve, she talked on the phone to Appellant about an order of protection Ms. Miranda had taken out against Appellant. Ms. Rodriguez told Appellant to “remain calm” or there would be problems. Appellant told Ms. Rodriguez that he wanted to talk to Ms. Miranda about the baby she was expecting and that he was going to leave her alone.

Victor Ramirez noticed that Ms. Miranda and her son were gone from the party at around 11:30 p.m.

Ms. Rodriquez called Appellant's apartment at either 11:40 or 11:52 p.m.³ Appellant answered the phone and wanted to know "what in the hell" Ms. Rodriquez wanted. Appellant informed Ms. Rodriquez that Ms. Miranda would return to her apartment when they were finished talking and hung up the phone.

The party went on without Ms. Miranda and Daniel, and the partygoers celebrated the new year. Jose David Acosta, Radames Melendez, Victor Ramirez, and "Joshua" left Ms. Rodriquez's apartment at around 12:04 a.m. Ray, Josh, and Victor went to Appellant's apartment to "look for the fireworks." Jose walked to the apartment but did not go inside.

When Mr. Melendez walked into the apartment, he saw Ms. Miranda sitting on the small sofa and Daniel sitting next to her. Ms. Miranda had her head down and was either mumbling or "trying to breathe." Her eyes were white, and she had her arm around Daniel's neck. There was a little hole with blood coming out of it in Daniel's head. Mr. Ramirez thought that Ms. Miranda was crying but soon realized that she was gasping for breath. Mr. Ramirez dialed 911 on his cell phone.

Mr. Melendez immediately put Daniel on the floor and began CPR. He tried to call 911 on the wireless phone. There was no battery pack in the phone, so he went to the kitchen to dial 911. Mr. Melendez did not recall seeing Appellant in the apartment at that time and stated that earlier that day the phone was working properly. Confessor Joshua Devalle also helped to lay Daniel down on the floor on a pillow. Mr. Devalle did not see Appellant anywhere at that time. Ms. Rodriquez again called Appellant's apartment at around 12:04 a.m. Ray answered the phone and told her that "something serious had happened" and he could not talk on the phone.

Veronica Arce had dropped off Mr. Devalle, her boyfriend, at the party at Ms. Rodriquez's apartment at around 10:15 p.m. She returned after midnight to pick him up and was informed that he was at Mr. Melendez's apartment. When Ms. Arce arrived at the apartment, she saw the victims on the sofa. She helped to place Daniel on the floor. According to the 911 supervisor for Montgomery County, 911 received a call from apartment 103 D at 12:05 a.m. The first officer arrived on the scene at 12:09 a.m.

Appellant was quickly developed as the suspect in the shootings. On the morning of January 3, 2001, Don Lloyd was visiting friends and family in Clarksville while en route to West Virginia to start a job. That morning before going to the Greyhound bus station, Mr. Lloyd read a newspaper article about the shootings. Mr. Lloyd got to the bus station at around 1:30 p.m. While he was waiting for his bus, he recognized Appellant from the newspaper. He watched Appellant tuck his

³ At trial, Ms. Rodriquez testified that she called at 11:52 p.m. At the preliminary hearing, she testified that she called at 11:40 p.m.

face into his hooded sweatshirt when people walked by and noticed that Appellant was avoiding eye contact. Mr. Lloyd asked a bus station employee to contact the police.

Mr. Lloyd sat next to Appellant in the waiting area. He told Appellant that his father had been shot and killed in a home burglary and that if Appellant had murdered Ms. Miranda and her son that he deserved whatever he got as punishment. Mr. Lloyd stated that Appellant “shrugged it off.”

A police officer arrived at the station and asked Appellant where he was going. Appellant did not respond. Officer Jack Hemmingsen of the Clarksville Police Department answered the dispatch call to go to the bus station. When Officer Hemmingsen arrived, he saw Appellant enter the bathroom. Appellant quickly opened the door, saw the officer, and closed the door again. Officer Hemmingsen waited for backup to arrive. In the meantime, the officer went to the back of the bathroom where he could still see the hallway and looked around the corner. Officer Hemmingsen noticed an open window and thought that Appellant might “come out the window.” He told Appellant, “You don’t want to do that,” then noticed that there were bars on the window.

When backup support arrived, the two officers approached the bathroom and identified themselves. They entered the bathroom and heard “grunting” sounds like someone was using the bathroom. When they pushed open the bathroom stall door they observed Appellant “standing there grunting like he was using the bathroom.” Appellant told them that his name was “Jose Cologne.” Appellant agreed to a search of his person. Officers discovered identification, a bus ticket, and a newspaper clipping of the shooting. When the officers found the newspaper clipping, Appellant “smiled . . . like he thought it was funny.”

Appellant was arrested and given his *Miranda* warnings. Appellant requested an attorney. At one point, Appellant was left alone in the room with Detective Eric Green, who speaks fluent Spanish. Appellant asked him if he were found guilty how much time would he have to serve. Detective Green responded that he did not know. Appellant replied, “a long time.” Appellant then said, “it’s not like . . . the kid died.”⁴ Detective Green did not respond to this statement. Appellant then asked Detective Green if he would have to serve his time in Clarksville or if he could serve it closer to home. Detective Green responded that he did not know.

Appellant was indicted by the Montgomery County Grand Jury in February of 2001 for two counts of first degree murder and two counts of felony murder. The State initially sought the death penalty. At trial, Dr. Feng Li, an assistant medical examiner in Davidson County, testified as to the cause of death of the victims. According to Dr. Li, Ms. Miranda had a penetrating gunshot wound to the left side of her head that was inflicted by a small caliber handgun. The second gunshot wound was to the right lower eyelid. Ms. Miranda had a third gunshot wound to her right shoulder. The cause of death was multiple gunshot wounds.

⁴ Detective Green was under the impression that Daniel had passed away at the time Appellant made this statement but that the death had not been made public knowledge.

Daniel Rodriguez, who was around five years old at time of his death, on the other hand, had two gunshot wounds, one on the left side of his forehead and one on the right side of his forehead. The child had gunpowder stippling on his head that indicated the shots were fired from an intermediate range of approximately six inches to three feet. Daniel's cause of death was also listed as multiple gunshot wounds. Police recovered five 25-caliber shell casings from the crime scene. They all came from the same 25-caliber firearm.

Neika Forrest Freeman also testified at trial. On the night of the shootings, she was working at The Pantry, a BP station on Lafayette Road. Appellant entered the store at around 1:45 a.m. on January 1, 2001, wearing dark khaki pants and a light brown shirt. He asked if he could come into the store to get warm. Appellant told her that he was "looking for numbers to call" because his car was broken down. Appellant crouched down and looked at papers that he pulled from his pocket. Appellant stayed at the store for 90 minutes before leaving with someone from the Clarksville Transit System. Ms. Freeman described Appellant as "a little nervous." Appellant told her that he lived "way out." At some point while Appellant was in the store, Ms. Freeman remembered that the Clarksville Transit System offered free rides. She called to secure a ride for Appellant. He left when the Clarksville Transit System driver arrived.

On January 2, 2001, Ms. Freeman recognized Appellant from a picture on the front page of the newspaper. She called the police hotline.

Appellant was picked up by Julian Pruitt of the Clarksville Transit System. Appellant seemed "a little anxious" and asked "in detail" how far Mr. Pruitt was allowed to drive someone. Mr. Pruitt told Appellant they could only drive people a certain distance due to insurance regulations. Appellant offered to pay Mr. Pruitt more money for taking him further. Mr. Pruitt eventually took Appellant to the Vacation Motel in the New Providence area. Appellant asked to be dropped off at the back of the building.

Appellant did not put on any proof at trial. At the conclusion of the proof, the jury convicted Appellant of two counts of first degree murder and one count of felony murder. The trial court merged the felony murder conviction with the first degree murder conviction. Prior to the sentencing phase of the trial, the trial court reviewed the proposed aggravating circumstances and found that none of the circumstances applied to the murder of Ms. Miranda. Therefore, the trial court immediately imposed a life sentence on that count. During the sentencing phase, the jury was instructed to determine the appropriate sentence for the murder of Daniel Rodriguez, life without the possibility of parole or life imprisonment. The jury deadlocked on the sentence, so the trial court sentenced Appellant to life imprisonment with the possibility of parole.

The trial court held a sentencing hearing on September 9, 2004. The only question at sentencing was whether the sentences were to run concurrently or consecutively. The trial court ordered the sentences to run consecutively based on the finding that Appellant was a "dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." T.C.A. § 40-35-115(b)(4).

Appellant filed a motion for new trial on August 20, 2004. An amendment to the motion for new trial was filed on July 2, 2007, to add a sentencing issue regarding *Blakely v. Washington*, 542 U.S. 296 (2004). The trial court conducted a hearing on the motion for new trial on August 23, 2007. The trial court denied the motion for new trial in an order entered on August 30, 2007.

On appeal, Appellant challenges the sufficiency of the evidence, his sentence, and the trial court's decision to allow the testimony of Detective Eric Green.

Analysis
Timeliness of the Notice of Appeal

Prior to the resolution of the issues herein, we must determine if the notice of appeal is timely. The State argues that the notice of appeal is untimely and, therefore, that Appellant "waived the issues on appeal for failure to file a timely notice of appeal." In a reply brief, counsel for Appellant suggests that the State concocted a "Grand Conspiracy Theory" in which the State, defense, and the trial court have somehow attempted to "by-pass a timely filing of the notice of appeal." Appellant also notes that the timeliness of the notice of appeal is not jurisdictional and can be waived by this Court on appeal.

The procedural background unfolded as follows. In the order denying the motion for new trial, entered by the trial court on August 30, 2007, the trial court appointed an attorney to replace trial counsel.⁵ The certificate of service on the order indicates that it was sent to counsel for the State and trial counsel. In the bottom left corner of the order there is a handwritten notation stating, "cc: [newly-appointed attorney and Appellant]." A second order was entered by the trial court on August 30, 2007, granting the motion to withdraw filed by trial counsel. This order stated that the trial court would "appoint substitute counsel by separate order."

Over seven months later, the notice of appeal was filed on April 2, 2008. The trial court entered an amended order on April 2, 2008, denying the motion for new trial and appointing counsel to replace trial counsel. The order stated:

[A] Certificate of Service was not attached to the August 30, 2007 Order and [new counsel] was not notified that the time was running for the appeal by previously appointed counsel, so the thirty (30) days to file a notice of appeal shall run from [sic] the date this order is entered.

As correctly noted by the State, the notice of appeal herein is untimely. Ordinarily, a trial court's judgment becomes final thirty days after its entry unless a notice of appeal or post-trial

⁵ Trial counsel filed a motion to withdraw on August 23, 2007, on the basis that trial counsel had been nominated by President George W. Bush to serve as the United States Attorney for the Middle District of Tennessee.

motion is filed. *State v. Boyd*, 51 S.W.3d 206, 211 (Tenn. Crim. App. 2000); Tenn. R. App. P. 4(a). After a judgment becomes final, the trial court loses jurisdiction over the matter. *Id.* An appeal as of right is initiated by the filing of a notice of appeal within thirty days of the entry of the judgment being appealed. Tenn. R. App. P. 3(e) & 4(a). It is the obligation of a defendant to perfect his appeal properly and/or to demonstrate that the interests of justice merit waiver of a late-filed notice of appeal. *See* Tenn. R. App. P. 4(a).

It is clear that the filing of the notice of appeal herein is untimely. Appellant did not file the notice of appeal until more than seven months after the final order entered by the trial court. Appellant argues in his reply brief that the untimeliness of the notice of appeal was the result of the failure of the trial court to notify counsel that he was representing Appellant on appeal. After receipt of the State's brief pointing out that Appellant filed an untimely notice of appeal, Appellant asks this Court to waive the timely filing requirement pursuant to Tennessee Rule of Appellate Procedure 4(a). First, we acknowledge that the amended order entered by the trial court on April 2, 2008, is, in essence, a nullity. The trial court lost jurisdiction over the matter thirty days after the entry of the final order on August 30, 2007 and was unable to extend the time for filing a notice of appeal. *See Boyd*, 51 S.W.3d at 211; Tenn. R. App. P. 4(a). However, we conclude that the interests of justice warrant a waiver of the timely filing of the notice of appeal in the case herein.

Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence on appeal. Specifically, he argues that the State did not introduce evidence to support premeditation and that the evidence, at best, proved that he committed second degree murder. The State, on the other hand, contends that the evidence was sufficient to show that Appellant "acted with premeditation when he used a deadly weapon on unarmed victims, . . . did not offer aid to the victims, and tried to flee to Massachusetts."

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reevaluating the evidence when considering the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier

of fact from circumstantial evidence.” *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

First degree murder is described as:

- (1) A premeditated and intentional killing of another;
- (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy;

T.C.A. § 39-13-202(a). Tennessee Code Annotated section 39-13-202(d) provides that:

“[P]remeditation” is an act done after the exercise of reflection and judgment. “Premeditation” means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

T.C.A. § 39-13-202(d). An intentional act requires that the person have the desire to engage in the conduct or cause the result. *Id.* § 39-11-106(a)(18). Whether the evidence was sufficient depends entirely on whether the State was able to establish beyond a reasonable doubt the element of premeditation. *See State v. Sims*, 45 S.W.3d 1, 7 (Tenn. 2001); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999). Whether premeditation is present is a question of fact for the jury, and it may be inferred from the circumstances surrounding the killing. *State v. Young*, 196 S.W.3d 85, 108 (Tenn. 2006); *see also State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000); *State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998).

Premeditation may be proved by circumstantial evidence. *See, e.g., State v. Brown*, 836 S.W.2d 530, 541-42 (Tenn. 1992). Our high court has identified a number of circumstances from which the jury may infer premeditation: (1) the use of a deadly weapon upon an unarmed victim; (2) the particular cruelty of the killing; (3) the defendant’s threats or declarations of intent to kill; (4) the defendant’s procurement of a weapon; (5) any preparations to conceal the crime undertaken before the crime is committed; (6) destruction or sequestration of evidence of the killing; and (7) a defendant’s calmness immediately after the killing. *Pike*, 978 S.W.2d at 914-15; *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997). This list, however, is not exhaustive and serves only to demonstrate that premeditation may be established by any evidence from which the jury may infer that the killing was done “after the exercise of reflection and judgment.” T.C.A. § 39-13-202(d); *see Pike*, 978 S.W.2d at 914-15; *Bland*, 958 S.W.2d at 660.

One learned treatise states that premeditation may be inferred from events that occur before and at the time of the killing:

Three categories of evidence are important for [the] purpose [of inferring premeditation]: (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, *planning activity*; (2) facts about the defendant's prior relationship and conduct with the victim from which *motive* may be inferred; and (3) facts about the *nature of the killing* from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

2 Wayne R. LaFare, *Substantive Criminal Law* § 14.7(a) (2d ed. 2003) (emphasis in original).

The evidence introduced at trial viewed in a light most favorable to the State showed that Appellant and Ms. Miranda had an unstable relationship. There was testimony from Ms. Rodriguez that indicated Ms. Miranda had an order of protection against Appellant. Appellant was the last person seen with both victims while they were alive. The victims were found shot to death inside Appellant's apartment. Both of the victims had multiple injuries, and all of the shell casings were fired from the same gun. The victims did not die immediately and were left to die by their killer. The evidence further showed that Appellant left the scene and waited in a nearby gas station for about 90 minutes before taking a Clarksville Transit System ride to a nearby hotel. Appellant was apprehended at a bus station several days later with a bus ticket to Massachusetts in his pocket along with an article about the shootings. When Appellant was left in a room alone with Detective Green after his arrest, he made the callous remark, "it's not like . . . the kid died." Again, premeditation may be proved by circumstantial evidence. *See, e.g., Brown*, 836 S.W.2d at 541-42. In the case herein, the State proved that Appellant: (1) used a deadly weapon upon unarmed victims; (2) shot at least one of the victims, a child, at close range; (3) had a volatile relationship with one of the victims; and (4) was relatively calm immediately after the killing when he was waiting at the gas station. *See Bland*, 958 S.W.2d at 660; *Pike*, 978 S.W.2d at 914-15. We conclude that the evidence was sufficient to allow the jury to infer premeditation. Accordingly, the evidence was sufficient to support the convictions. Appellant is not entitled to relief on this issue.

Testimony of Detective Green

Appellant complains that the trial court improperly admitted statements that he made to Detective Eric Green after Appellant had invoked his right to counsel. Specifically, Appellant argues that the State did not show that Appellant intelligently waived his right to counsel and that Appellant did not understand that talking to Detective Green "was throwing away his right to speak with an attorney." The State contends that while Appellant had invoked his right to counsel, he waived that right voluntarily when he made spontaneous comments to Detective Green. The State relies on *Massiah v. United States*, 377 U.S. 201 (1964), to argue that even though adversarial proceedings had commenced against Appellant and Detective Green was a governmental agent, there was no

interrogation of Appellant in violation of Appellant's Fifth or Sixth Amendment rights and therefore, the trial court properly admitted Appellant's statements.

Appellant objected to Detective Green's testimony at trial, asking the trial court to suppress the statements made by Appellant to Detective Green after Appellant was arrested and had invoked his right to counsel. The trial court held a jury out hearing on the matter during which it heard the proposed testimony of Detective Green. According to Detective Green, Appellant was arrested and given *Miranda* warnings. Appellant invoked his right to counsel, and then Appellant was left alone in a room with Detective Green, who speaks fluent Spanish. Detective Green merely sat in the room with Appellant. Appellant asked him if he were found guilty how much time would he have to serve. Detective Green responded that he did not know. Appellant replied, "a long time." Appellant then said, "it's not like . . . the kid died." Detective Green did not respond to this statement. Appellant then asked Detective Green if he would have to serve his time in Clarksville or if he could serve it closer to home. Detective Green responded that he did not know.

After hearing the testimony, the trial court determined that: (1) "[i]n the absence of interrogation the fifth and 14th amendments do not prohibit police from merely listening to a defendant's voluntary - - volunteered statements and using them against them at trial;" (2) that the State followed the proper procedure by honoring Appellant's wishes to invoke his right to remain silent; (3) that Appellant voluntarily "initiated the conversation with Mr. Green by asking a question;" and (4) Appellant's statements were "not the result of police action that would have been or could be construed as being in violation of the *Miranda* warnings." The trial court further determined that the statements made by appellant were relevant to the shooting deaths of the victims and the statements were more probative than prejudicial. Finally, the trial court determined that Detective Green's actions and reactions to Appellant's questions were not some sort of "subterfuge" designed to invite responses from Appellant.

"This Court will uphold a trial court's findings of fact in a suppression hearing unless the evidence preponderates otherwise." *State v. Hayes*, 188 S.W.3d 505, 510 (Tenn. 2006) (citing *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). On appeal, "[t]he prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. Our review of a trial court's application of law to the facts is de novo, with no presumption of correctness. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001) (citing *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999); *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)). When the trial court's findings of fact are based entirely on evidence that does not involve issues of witness credibility, however, appellate courts are as capable as trial courts of reviewing the evidence and drawing conclusions, and the trial court's findings of fact are subject to de novo review. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000).

The Fifth Amendment to the United States Constitution provides in pertinent part that “no person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. Similarly, Article I, Section 9 of the Tennessee Constitution states that “in all criminal prosecutions, the accused “shall not be compelled to give evidence against himself.” Tenn. Const. art. I, § 9. However, an accused may waive this right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the United States Supreme Court held that a suspect “must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” *Id.* at 479. The Supreme Court held that a suspect may knowingly and intelligently waive the right against self-incrimination only after being apprised of these rights. *Id.* Accordingly, for a waiver of the right against self-incrimination to be constitutionally valid, the accused must make an intelligent, knowing, and voluntary waiver of the rights afforded by *Miranda*. *Id.* at 444. A court may conclude that a defendant voluntarily waived his rights if, under the totality of the circumstances, the court determines that the waiver was uncoerced and that the defendant understood the consequences of waiver. *State v. Stephenson*, 878 S.W.2d 530, 545 (Tenn. 1994). In order to be considered voluntary, the statement ““must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.”” *Bram v. United States*, 168 U.S. 532, 542-43 (1897) (quoting 3 Russ. Crimes (6th Ed.) 478); *see also State v. Kelly*, 603 S.W.2d 726, 727 (Tenn. 1980). However, “[a] defendant’s subjective perception alone is not sufficient to justify a conclusion of involuntariness in the constitutional sense.” *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996). Instead, ““coercive police activity is a necessary predicate to finding that a confession is not voluntary”” *Id.* (quoting *State v. Brimmer*, 876 S.W.2d 75, 79 (Tenn. 1994)).

It is not disputed that Appellant was in police custody. Appellant had been arrested for the shootings of the victims and was in custody for purposes of *Miranda*. There is also no question that Appellant was given his *Miranda* warnings. In fact, Appellant had already invoked his right to counsel at the time he initiated the conversation with Detective Green. However, the parties do not agree on whether the detectives’ presence and responses to Appellant’s questions amounted to interrogation.

Recently, the Tennessee Supreme Court examined a similar issue in *State v. Northern*, 262 S.W.3d 741 (Tenn. 2008). In *Northern*, the court examined whether a videotaped confession made after *Miranda* warnings was barred by an earlier incriminating statement that was made during a prior unwarned custodial interrogation. *Id.* at 744. The court explained:

“Interrogation” for purposes of *Miranda* includes “express questioning or its functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L. Ed. 2d 297 (1980). The functional equivalent of express questioning refers to “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an

incriminating response from the suspect.” *Id.* at 301, 100 S.Ct. 1682 (footnotes omitted).

Northern, 262 S.W.3d at 750.

After hearing the evidence, the trial court determined that Detective Green was credible and that there was no evidence that Detective Green coerced, threatened, intimidated, or in any other way violated Appellant’s constitutional rights against self-incrimination. The evidence does not preponderate against the judgment of the trial court. In the case herein, we determine that Appellant has failed to establish that the evidence preponderates against the trial court’s determination that the statements were freely, voluntarily and spontaneously made. There were no words spoken by Detective Green that were “‘likely to elicit an incriminating response from the suspect.’” *Northern*, 262 S.W.3d at 750 (quoting *Innis*, 446 U.S. at 301). Appellant is not entitled to relief on this issue.

Consecutive Sentencing

Finally, Appellant argues that his sentences should run concurrently pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004). The State argues that *Blakely* does not apply to consecutive sentencing.

At the outset, we note that the transcript of the sentencing hearing does not appear in the record on appeal. It is the duty of Appellant to include a complete record on appeal. *See State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998) (holding that failure to include trial transcript on appeal waived challenge to sentence); *State v. Ballard*, 855 S.W.2d 557, 560-61 (Tenn. 1993) (holding failure to include transcript precludes appellate review); *State v. Oody*, 823 S.W.2d 554-559 (Tenn. Crim. App. 1991) (holding trial court’s ruling presumed correct in absence of an adequate record on appeal).

Even though there is no transcript, it appears from the record that the trial court imposed consecutive sentences based on the “dangerous offender” category from *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995). Nonetheless, without the transcript, appellate review is precluded. Notwithstanding the waiver, the our supreme court has specifically noted that *Blakely v. Washington*, 542 U.S. 296 (2004), did not impact Tennessee’s consecutive sentencing scheme. *State v. Allen*, 259 S.W.3d 671, 689-90 (Tenn. 2008); *State v. Robinson*, 146 S.W.3d 469, 499 n.14 (Tenn. 2004). In addition, this Court has consistently found that *Blakely* does not affect consecutive sentencing determinations. *See State v. Montreal Lyons*, No. W2006-02445-CCA-R3-CD, 2008 WL 2699657, at *4 n.4 (Tenn. Crim. App., at Jackson, July 9, 2008), *perm. app. denied*, (Tenn. Jan. 9, 2009); *State v. Earice Roberts*, No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at *12 (Tenn. Crim. App., at Jackson, Nov. 23, 2004), *perm. app. denied*, (Tenn. Mar. 21, 2005); *State v. Lawrence Warren Pierce*, No. M2003-01924-CCA-R3-CD, 2004 WL 2533794, at *13 (Tenn. Crim. App., at Nashville, Nov. 9, 2004), *perm. app. denied*, (Tenn. Feb. 28, 2005). Appellant is not entitled to relief on this issue.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE